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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1969

No. 480

ARIZONA CORPORATION COMMISSION, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

On Appeal from The United States District Court for The District of Nebraska

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BRIEF OF APPELLANT STATE REGULATORY COMMISSIONS OPPOSING MOTIONS TO AFFIRM

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The motion to affirm filed by the government characterizes the appeals as seeking "to have the Court resolve a dispute within the railroad industry on highly complex and technical questions." (p. 9).

This is not merely a dispute between railroads. Were it merely that, there would be no need for an appeal by the state regulatory commissions of twenty-one states (Arizona, Arkansas, California, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana,

Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Texas, Washington and Wyoming).

While "highly complex and technical questions" may have been involved before the Commission, the question presented to the Court in the jurisdictional statement filed by the state regulatory commissions (hereinafter referred to as "states") can hardly be so characterized. It is: whether the Interstate Commerce Commission acted contrary to the provisions of 49 U.S.C. § 1 (14)(a) when it prescribed new rates for the use of freight cars without considering the effect of those new rates upon the freight car supply. It is a matter of statutory construction, and does not involve complex questions concerning railroad economics or the effects of various methods of computing rates on railroads and their users.

The government's motion attempts to interject issues which are not relevant to the question of statutory construction. At page 12, footnote 7, for instance, the motion quotes from an Interstate Commerce Commission order. In doing so it infers that per diem rates make no difference to railroads in their determination to build railroad cars. The obvious answer is that in fact the Commission failed to consider incentive rates at all. But neither the inference nor the answer to it will lend assistance to the Court, as neither relate to whether or not the Interstate Commerce Commission should or should not

have prescribed new rates without considering the effect of those rates on freight car supply.

The "complexity" of the question presented is limited to a single area, ferreting out the various indicia of congressional intent. The government's motion contains only one of many such indicia (p. 12). The jurisdictional statement of the states contains several, and a brief from the states, should probable jurisdiction be noted, will set forth the various manifestations of congressional intent which have compelled them to believe that the Commission erred in prescribing per diem rates without adherence to the plain statutory mandate of 49 U.S.C. § 1 (14)(a).

The reference to legislative history mentioned (p. 13) by the government is fragmentary, and this, too, requires full discussion by way of a brief in order that its significance may be analyzed and not be considered out of context. Demonstrably, the Commission had no authority to override the statute.

If permitted to do so, the states will show through their brief that the amendment to the statute which provides for incentive per diem rates was enacted at the behest of state governments and shippers, and not at the request of railroads, although some railroads favored the amendment while others opposed it. The motive of the states and shippers was

to reduce the frequency and intensity of chronic car shortages through car rental rates. It was expected that car rental rates would result in better utilization of the present car fleet (as noted in the States' jurisdictional statement, p. 7, the average freight car is idle over 300 days per year). The car rental rates on those types of cars in particularly short supply could be set at levels sufficiently high to encourage additions to the fleet. The government's attitude is accordingly quite surprising. While not denying that chronic car shortages do exist, the government sees fit to prescribe car rental rates, which on balance are very substantially lower than existing rates, and to defend that action on the basis that at some time in the unforeseeable future they may get around to obeying the mandate of Congress. The result is, of course, anti-incentive per diem rates under which a car can be left idle on a siding until cargo can be found for it. The car will incur no mileage charge, of course, and the very low time charge greatly reduces the incentive to return an empty car to its owner.

Inadequate car rental charges are responsible in part for chronic car shortages. Shippers and government representatives convinced a sufficient number of Congressmen that car rental rates should be set at a level which would improve the situation, and Congress provided therefor. The government has seriously distorted the purpose of the con-

gressional enactment, and has proceeded to prescribe rates which will aggravate the car supply situation. The states claim this to be error since it ignores the clear intent of Congress, and submit that they should have their day in court to show that error. The motions to affirm filed herein should be denied.

Respectfully submitted,

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